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Supreme Court, U.S.
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No. 08-1153

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In The Supreme Court of the United States

ADELINE B. BENJAMIN,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether as a matter of law the United States Court of Appeals for the Federal Circuit erred in holding that there was a nexus between an employee's misconduct and its impact on the efficiency of the service pursuant to 5 U.S.C. § 7513(a)?

2. Whether the United States Court of Appeals for the Federal Circuit erred affirming the decision of the Merit System Protection Board in declining to mitigate the penalty of removal?

RULE 14.1(b) STATEMENT

Pursuant to Supreme Court Rule 14.1(b), Petitioner Adeline Benjamin ("Benjamin") states that all parties to the proceedings below appear in the caption of the case on the cover page.

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PETITITION FOR WRIT OF CERTIORARI

CITATION OF OPINIONS AND ORDERS

The initial per curiam opinion of the panel of the Court of Appeals dated October 8, 2008 is unpublished. App. at 1a. On December 15, 2008, the Court of Appeals issued an order denying the motion for rehearing. App. at 78a. That decision is unpublished. The Merit Systems Protection Board issued its decision on August 10, 2007. That decision is unpublished. The Administrative Law Judge ("AJ") issued his Initial Decision (unpublished) on January 24, 2007. App. at 9a.

JURISDICTION

By letter dated September 8, 2006, the United States Department of Agriculture ("Agency") terminated Adeline Benjamin ("Benjamin") from her position as a Grants and Agreements Specialist. On September 25, 2006, Benjamin filed a timely appeal of that decision to the Merit Systems Protection Board ("MSPB"). Jurisdiction vested in the Board pursuant to 5 U.S.C. § 7701, *et seq*. A hearing was held before Administrative Law Judge Daniel Madden Turbitt ("AJ") on November 30, 2006. By Order dated January 24, 2007, the AJ issued an Initial Decision affirming the Agency's removal action. Thereafter, Benjamin filed a Petition for Review with the full panel of the MSPB. By Order dated August 10, 2007, the MSPB denied Benjamin's appeal and affirmed the AJ's Initial Decision. The August 10, 2007 Order was the final decision from the MSPB. Thereafter, Benjamin noted her timely

appeal to the Court of Appeals for the Federal Circuit which had jurisdiction to hear a direct appeal from a decision of the MSPB pursuant to 28 U.S.C. § 1295(a)(9). The Court of Appeals issued its per curiam Opinion on October 8, 2008. Benjamin timely filed a Petition for Rehearing, which was denied by Order dated December 15, 2008. This Court has jurisdiction on a writ of certiorari pursuant to 28 U.S.C. § 1254.

RULES AND STATUTES INVOLVED

The question raised in this Petition implicates 5 U.S.C. § 7513, which states in pertinent part as follows:

> **(a)** Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.
>
> **(b)** An employee against whom an action is proposed is entitled to—
>
> > **(1)** at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
> >
> > **(2)** a reasonable time, but not less than 7 days, to answer orally and in writing

and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

STATEMENT OF THE CASE

A. BACKGROUND

On or about July 25, 2006, the Agency issued a Notice of Proposed Removal. The proposal detailed allegations of misconduct on the part of Benjamin between May 16, 2006 and July 13, 2006. Benjamin (through counsel) filed a written response to the Notice of Proposed Removal, in which she denied the allegations. The Agency then submitted the matter to Curtis Wilburn ("Wilburn") for his consideration. It should be noted that Wilburn was Benjamin's second-line supervisor and he had been involved in EEO and other litigation with Benjamin since at least the year 2000. By letter dated September 8, 2006, Wilburn issued his decision, removing Benjamin from her position. Benjamin filed an appeal to the MSPB, and the AJ held a hearing on November 30, 2006. By Order dated January 24, 2007, the AJ issued an Initial Decision affirming the Agency's removal action. App. at 9a. Thereafter, Benjamin noted a timely appeal and filed a Petition for Review with the MSPB. The MSPB likewise denied Benjamin's claim, and she pursued her appeal to the United States Court of Appeals for the Federal Circuit.

B. THE EMPLOYMENT ISSUES GIVING RISE TO THIS CASE

Benjamin began her employment with the Agency in 1988. Commencing in 1998, Benjamin began working in the Extramural Agreements Division ("EAD") office of the USDA, Beltsville,

Maryland. Benjamin's job duties encompassed dealing with various research-grant recipients in the Pacific West area; the North Atlantic area; the Midwest area; and the International Office of Research programs. In her position, Benjamin worked mostly with foreign scientists and she was responsible for managing approximately 240 agreements. A good deal of the issues in this case surround issues of processing of various "extramural" agreements. These agreements between the Agency and third parties have a limited lifespan, and the grants & agreement specialists (like Benjamin) are responsible for ensuring that all of the reports are received, all of the amounts are zeroed out, final payments are made and closing the file and then moving it to the National Records Center.

On May 16, 2006, Benjamin's supervisor, Sherri Carroll ("Carroll"), issued a letter of deficiency to Benjamin. The letter alleged that Benjamin was deficient in certain elements of her performance: "To assist you in improving under these elements, I am extending your performance rating for ninety (90) days, until August 16, 2006, to provide you an opportunity to obtain an overall "Fully Successful" appraisal. This letter contained a Performance Improvement Plan ("PIP"). The letter said that Benjamin was to provide a list of expired agreements in her possession and was to provide Carroll certain information no later than May 30, 2006. The letter also said that Benjamin was to provide Carroll with the status of her agreements on a weekly basis. Benjamin provided weekly status

reports although the Agency maintains that the reports were not sufficiently detailed.

The Agency's allegations of misconduct occurred after the issuance of the PIP letter (but before Benjamin had actually completed the 90-day period specified in the letter). Indeed, by letter dated July 25, 2006, the Agency proposed Benjamin's removal from her position. The purported basis for the removal was Benjamin's misconduct based upon two (2) charges: (1) failure to follow supervisory instructions; and (2) repeated acts of disrespectful conduct toward her supervisor which are outlined below:

> **CHARGE 1: Failure to Follow Supervisory Instructions**
>
> **Specification 1**
>
> **On May 30, 2006, you provided your list of pending close out activities. However, it was unsatisfactory.**
>
> **Specification 2**
>
> **On May 25, 2006, you provided your list of pending actions. However, it was unsatisfactory. Specifically, you failed to document each action taken on the pending agreement or amendment from the date you received the action. . .**

Specification 3

On May 31, 2006, Ms. Carroll sent you an email instructing you to revise your CY-2005 weekly/monthly report because it was unacceptable . . . Your revision was unsatisfactory. Specifically, you resubmitted an exact duplicate of the listing provided on May 30, 2006, with the exception of page 6.

Specification 4

On May 5, 2006, Ms. Carroll gave you an assignment to provide weekly updates on the Ozone Fumigation of Coffee Leaf Project. . . . You submitted status reports on this agreement that were exact duplicates of the previous report.

Specification 5

You provided a list of pending actions dated June 1, 2006, which was again, unacceptable because it was not in accordance with the written instructions given to you on May 16, 2006. Specifically, you failed to document each action taken on the pending agreement or amendment from the date you received each action.

Specification 6

On June 15, 2006, Ms. Carroll sent you an e-mail verifying your weekly meeting earlier that day. . . Specifically, you failed to document each action taken on the pending agreement or amendment from the date you received the action.

Specification 7

On June 22, 2006, you provided a list of pending actions that was unacceptable and not in accordance with written instructions given to you on May 16, 2006, and which you were reminded of on June 8, 2006. There was no indication of how many close out actions were completed or status of your attempts to close any of your expired agreements.

Specification 8

On June 1, 2006, Ms. Carroll implemented written procedures to be followed by GAMS Specialists with regard to covering the Agreements Information Management System (AIMS) Helpdesk [ ] On June 8, 2006, you responded directly to a request for help received from the Beltsville

area. This is not your area of responsibility. [1]

Specification 9

On June 23, 2006, you did not follow written procedures with regard to covering the AIMS helpdesk. . . in the June 1, 2006 memo which clearly stated that issues were to be discussed with Ms. Hicks and/or Ms. Gregor prior to involving the OCIO. [2]

Specification 10

On July 13, 2006, you provided a list of pending actions which was unacceptable because it was not in accordance with the written instructions given to you on May 16, 2006 . . . Ms. Carroll explained that the report was missing details such as receipt dates, names of personnel you spoke with or met

---

[1] Note: With respect to this issue, the AJ did not sustain the Agency's allegations that the Appellant failed to follow supervisory instructions as set forth in the June 1, 2006 memorandum covering the AIMS Helpdesk.

[2] The AIMS help desk is "a help desk designed to support the Agreements Information System which is [the USDA] computer system designed to manage all extramural agreements projects agency-wide for all area offices and headquarters."

with and details of your conversations on actions taken.

CHARGE 2: Repeated Acts of Disrespectful Conduct toward Your Supervisor

Specification 1

On May 18, 2006 [during a meeting with Carroll when she was explaining what was required] you began looking at her with a very unusual expression on your face, puckering your lips and leering at her.

Specification 2

On May 31, 2006 at 12:12 p.m., Ms. Carroll sent an appointment to all GAMS specialists and to Miss Kim Hicks to attend a meeting to discuss coverage of the AIMS Helpdesk mailbox at 3 p.m. . . . Ms. Carroll went to your cubicle shortly after 3 p.m. and you were not at your desk. . . [Carroll] returned to your cubicle to find you standing at your desk reading a piece of paper. She announced that they were waiting for you before starting the meeting. You responded that you'd be there in a moment. She stated that the

meeting was starting and that you were late ... but you remained and resumed reading a piece of paper.

Specification 3

On June 23, 2006, Ms. Carroll instructed you to meet with Kim Hicks to discuss an unresolved helpdesk request. . . Ms. Carroll asked you directly if you had consulted with anyone in the OCIO, you ignored her question. She repeated herself and you turned toward her and began grimacing at her.. . you stated that neither person was available and began giggling as you walked past Ms. Carroll.

Specification 4

On July 13, 2006, you reported for your scheduled meeting at 9 a.m. You provided a list of pending actions, which was unacceptable because it was not in accordance with the written instructions given to you on May 16, 2006 . . Ms. Carroll discussed her expectations and concluded the meeting. You remained in your seat giving her a menacing look.

C. THE PROCEEDINGS AT THE MERIT SYSTEM PROTECTION BOARD

Following her removal, Benjamin timely filed an appeal to the Merit Systems Board. The case was assigned to Administrative Judge Daniel M. Turbitt. A hearing was held in November, 2006. The AJ received documentary evidence in the record, which included Benjamin's status reports; email communications between Benjamin and her supervisors; and the disciplinary history. The following individuals testified:

1. Curtis Wilburn (Benjamin's second-line supervisor and the deciding official on the removal action).

2. Sherri Carroll (Benjamin's first-line supervisor and the proposing official on the removal action).

3. Kim Hicks (Benjamin's co-worker).

4. Adeline Benjamin (Petitioner/Appellant).

5. Michael Wycoff (Benjamin's former supervisor).

6. Heather Phelps (Benjamin's co-worker).

7. Angel Cradle (Benjamin's co-worker).

On January 24, 2007, the AJ issued his written opinion. He sustained both charges of the removal action and made credibility findings. Ultimately, the AJ determined that the Agency had sustained its burden of proof on both charges and rejected Benjamin's contention that she was the victim of unlawful reprisal under Title VII. The AJ held that the sustained charges bore a logical connection to the efficiency of the service and declined to mitigate the penalty. App at 9a.

Benjamin filed a Petition for Review to the full Board. By Order dated August 10, 2007, the MSPB denied Benjamin's appeal and affirmed the AJ's Initial Decision. The Order provides in pertinent part as follows:

> The appellant has filed a petition for review asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation.
>
> * * * *
>
> After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulations that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. App. at 3a.

D. THE APPELLATE PROCEEDINGS

Benjamin filed an appeal to the United States Court of Appeals for the Federal Circuit arguing that: (1) the decision of the MSPB was not supported by substantial evidence; (2) there was a lack of nexus between the misconduct and the efficiency of the service; (3) the termination was motivated by Benjamin's prior EEO protected activity (i.e. retaliation); (4) the removal action was procedurally flawed because the removing official (Curtis Wilburn) did not have the requisite authority; and (5) the AJ abused his discretion in refusing to mitigate the penalty. The USDA argued: (1) that the standard of appellate review of factual findings and credibility is necessarily limited; (2) the finding of failure to follow supervisory instructions demonstrates the necessary nexus; (3) Benjamin was removed for misconduct and not due to protected EEO activity; (4) Benjamin waived any claim that Wilburn did not have the requisite authority; and (5) there was no abuse of discretion in refusing to mitigate the penalty. The Federal Circuit issued a per curiam opinion affirming the MSPB. App. at 9a. Benjamin filed a timely motion for rehearing which was likewise denied. App. at 78a.

REASONS FOR GRANTING THE PETITION

A. THE FEDERAL CIRCUIT ERRED AS A MATTER OF LAW IN AFFIRMING THE DECISION OF THE MERIT SYSTEM PROTECTION BOARD BECAUSE THE RECORD DOES NOT SUPPORT A NEXUS BETWEEN THE MISCONDUCT AND THE EFFICIENCY OF THE SERVICE UNDER 5 U.S.C. § 7513

By Order dated October 8, 2008, the Court of Appeals issued its opinion stating as follows:

> This CAUSE having been heard and considered, it is
> ORDERED and ADJUDGED:
> Per Curiam (RADER, SCHALL, and PROST, Circuit Judges).
> AFFIRMED. App. at 1a.

By Order dated August 10, 2007, the Merit Systems Protection Board issued its decision stating in pertinent part as follows:

> After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. App. at 3a.

In his Initial Decision dated January 24, 2007, the AJ addressed the issue of nexus as follows:

> After considering the record as a whole, I find that most of the appellant's misconduct occurred on the employer's premises, directly involved the appellant's supervisor, and clearly was destructive of the supervisor-employee relationship. [citations omitted] Accordingly, I find that her conduct has a nexus, or logical connection, to the efficiency of the service, and that the sustained charge warrants disciplinary action to promote the efficiency of the service. [citations omitted] App. at 9a.

On information and belief, the United States Supreme Court has never formally issued its reading or understanding as to precisely what is required under 5 U.S.C. § 7513. The case law has largely developed by the Court of Appeals for the Federal Circuit and the Merit Systems Protection Board. One of the leading cases cited by the Court of Appeals for the Federal Circuit and the Merit Systems Protection Board is *Mings v. Department of Justice*, 813 F.2d 384 (Fed. Cir. 1987). In *Mings*, the employee worked for the Immigration and Naturalization Service as a border patrol agent. The INS removed Mings after he had written a letter disparaging of Catholics and Hispanics. There was also some evidence that Mings would modify his testimony at the administrative hearing if the INS hired his son. Mings challenged his removal before the Merit Systems Protection Board, which affirmed the removal. Mings then filed an appeal to the United States Court of Appeals for the Federal Circuit. In commenting on the nexus issue, the Court of Appeals said as follows:

> Under 5 U.S.C. § 7513 (1982), an employee may be removed only for such cause as will promote the efficiency of the service. This "nexus" limitation requires the agency to show by a preponderance of the evidence that the employee's misconduct is likely to have an adverse effect on the agency's functioning. *White v. United States Postal Service*, 768 F.2d 334, 335-36 (Fed. Cir. 1985)

The *Mings* Court found that the efficiency of the service was promoted because it said:

> (1) [T]he petitioner's bias against and intolerance of Catholics and Hispanics and his critical attitude regarding his superiors and co-workers cast grave doubts on the petitioner's ability to discharge his duties as a border patrol agent in a fair and impartial manner.
>
> * * *
>
> Moreover, the petitioner's implied threat to Mr. Creppy impaired his credibility and his ability to function effectively as a border patrol agent. *Mings*, 813 F.2d at 389

In the case *sub judice*, Benjamin's job involved servicing customers (scientists in the United States and around the world) in various co-operative agreements. Benjamin respectfully avers that there is insufficient evidence as a matter of law demonstrating the necessary nexus. Thus, if the Court grants the Writ for Certiorari, this Court will

be afforded the opportunity to comment on the quantum of evidence that is necessary to prove nexus. While in *Mings* the evidence of nexus was relatively straightforward, the evidence in this case is much different. Indeed, while the record contains evidence of Benjamin's job description and her duties, there is a dearth of evidence as to the mission of the United States Department of Agriculture (in general) or the grants and agreements office (in particular). One is left to speculate, how (if at all) Benjamin's misconduct impacted the Agency mission. If the words of the statute are to have any meaning whatsoever (and if the process of judicial review is to be meaningful in any real sense), a federal agency should properly be held to the express statutory requirements. In the case *sub judice*, the Agency did not put forward evidence to demonstrate nexus as a matter of law. For example, in its brief before the Federal Circuit, the Agency relies upon truisms such as: "It is beyond dispute that disrespectful behavior towards a supervisor is not conducive to an effective working environment." *Webster v. Department of the Army*, 911 F.2d 679, 688 (Fed. Cir. 1990); or "an employee's failure to follow supervisory instructions affects the efficiency of the service." *Blevins v. Department of the Army*, 26 M.S.P.R. 101, 104 (1985), *aff'd*, 790 F.2d 95 (Fed. Cir. 1986)."

To be clear, when the Court of Federal Appeals reviews a case from the Merit Systems Protection Board, the standard of review is highly deferential. Indeed, the Court will affirm an MSPB decision unless it is:

1. arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

2. obtained without procedures required by law, rule or regulations having been followed; or

3. unsupported by substantial evidence. 5 U.S.C. § 7703c1-3.

It is respectfully submitted that the Court of Appeals for the Federal Circuit did not properly exercise its function on judicial review (even granted the deferential standard of review) because the record is devoid of probative and substantial evidence showing nexus as required by 5 U.S.C. § 7513. Specifically:

1. Benjamin's second-line supervisor and the deciding official, Curtis Wilburn, described Benjamin's job as a Grants & Agreements Specialist as follows:

> A grants and agreements specialist has the responsibility for negotiating, awarding, administering and closing out various types of extramural agreements and making sure that the Agency's interests in performance of these projects is protected.

When questioned on cross-examination as to Charge 2, Specification 3 (concerning Benjamin's failure to go through the chain of command with a computer-related question), Wilburn said that he was unaware

that the problem was solved and that it "perhaps" affected the relationship with the Office of the Chief Information Officer. This speculative testimony is insufficient as a matter of law to prove that the efficiency of the service was actually affected or that Benjamin's removal is indeed necessary.

Another interesting insight into the lack of nexus occurred in Wilburn's testimony on cross-examination concerning Charge 2, Specification 1 (concerning unusual facial expressions):

> QUESTION: And is it your testimony today, sir, that removing – it's appropriate to remove an employee from federal service based upon making unusual facial expressions, puckering lips and leering at someone?
>
> ANSWER: That is not my testimony
>
> QUESTION: Well that is one of the bases for this specification, isn't it?
>
> ANSWER: This is one of the bases, yes.

2. The proposing official, Sherri Carroll, testified on the issue of nexus, but only in a very limited manner:

> QUESTION: [D]id Ms. Benjamin's behavior affect the efficiency of your division in the service of the Agency?
>
> CARROLL: Yes.

When pressed on cross-examination, Carroll admitted that the conduct (as outlined in Charge 2, Specification1) did not affect Benjamin's ability to service her agreements and her customers.

3. Benjamin's co-worker, Kim Hicks testified as to issues surrounding a computer problem (Charge 1, Specification 9; Charge 2, Specification 3):

> QUESTION: [Y]ou're not able to tell us that the Agency suffered any adverse consequence as a result of anything Ms. Benjamin did or didn't do.
>
> ANSWER: I cannot. It was a printing error that the individual suffered. . .
>
> * * * *
>
> [T]he individual could not perform his or her functions which they're paid to perform.
>
> * * * *
>
> QUESTION: And as far as you know, Ms. Benjamin followed up on it, right?
>
> ANSWER: Yes, she eventually followed up on it.
>
> QUESTION: Okay. And Ms. Benjamin, to your knowledge, didn't cause the computer glitch that resulted in this issue, right?

ANSWER: No, she did not cause the computer problem.

4. In order to justify the removal action, the statute requires that there be evidence that the "cause will promote the efficiency of the service." One of Benjamin's co-workers, Heather Phelps testified that she worked with Benjamin every day for three to five years. According to Phelps, Benjamin was always pleasant and at no time did she make weird faces or unusual facial expressions. Phelps testified that Benjamin was a team player; and that she was very service-oriented and cooperative.

5. Another witness, Angel Cradle, testified that she interacted with Benjamin on a weekly or monthly basis; that Benjamin was a team player; that she got along with the other employees; and that she helped to ensure that the agreements were in good order.

Pursuant to the provisions of Rule 14 of the Supreme Court Rules of Procedure, Adeline Benjamin, the Petitioner herein, respectfully requests this Court to grant a Writ of Certiorari in the instant case. The record does not reveal how the efficiency of the service was impacted in any concrete manner or how removal would promote the efficiency of the service. The Federal Circuit and the Merit Systems Protection Board appear to read the statute to say that even *de minimus* conduct would in some way support a finding of nexus. To illustrate this point, one can examine the case of *Brown v. Department of the Navy*, 229 F.3d 1356 (Fed. Cir.

2000). In *Brown*, a civilian employee with the United States Marine Corps was terminated from his position as a manager for the base Morale, Welfare and Recreation Department because he had an adulterous affair with the spouse of a Marine Corps officer. Brown's job required him to work with Marine Corps service members and their families. The Administrative Law Judge sustained the removal, and the Court of Federal Appeals affirmed the decision:

> The administrative judge's findings that Mr. Brown's misconduct affected MWR's ability to perform its mission and undermined management's trust and confidence in his job performance and were based on evidence provided by five witnesses who testified at the hearing. The MWR operations officer testified that Mr. Brown's misconduct had undermined the credibility of MWR among the units it was assigned to support, which was 'very damaging to MWR and to the job [Mr. Brown] was hired to do." The base volunteer coordinator testified that she and other Marine spouse volunteers worked with the MWR program among the Marine Families, and the conduct such as Mr. Brown's would threaten her program by putting it is a less favorable light. Id at 1359-1360

The dissenting opinion in Brown pointed out the degree to which the nexus requirement had been stretched:

> The AJ found that "the agency has . . . proven nexus by showing by preponderant evidence that [Brown's] misconduct affected management's trust and confidence in his job performance."
>
> * * *
>
> However, all of the evidence adduced at the Board's hearing was conjectural, speculative or unrelated to Brown's actual job responsibilities. *Brown* 229 F.3d at 1365

The dissent pointed out that the record was devoid of testimony from Marines and family members who Brown was charged with supporting. The dissent was also concerned as to the lack of specificity in the majority opinion as to the agency's mission:

> In measuring employee conduct, it is the agency's mission at large that must be considered and not merely a division or lesser group within the agency. I have found no case from this, or any other, court, in which the mission of a unit smaller than the agency was considered. *Id* 1367

B. THE FEDERAL CIRCUIT ERRED IN AFFIRMING THE MSPB IN REFUSING TO MITIGATE THE PENALTY OF REMOVAL

In affirming the penalty of removal, the AJ said as follows:

> Before it can be concluded that a particular penalty promotes the efficiency of the service, it must appear that the penalty takes reasonable account of all relevant mitigating factors in the particular case. See *Douglas v. Veterans Administration*, 5 MSPR 280, 303 (1981) In making such determinations the Board gives due weight to the agency's primary discretion in exercising its managerial function of maintaining employee discipline and efficiency, and recognizing the Board's function is not to displace management's judgment to assure that it has been properly exercised. See id at 306

Ultimately, the AJ refused to mitigate the penalty. Rather, the AJ said that the deciding official, Curtis Wilburn, properly reviewed the factors under *Douglas v. Veterans Administration*, and determined that mitigation was not appropriate.

In *Parker v. United States Postal Service*, 819 F.2d 1113, 1116 (Fed. Cir. 1987), the Court of Appeals said that 'deference is given to the agency's judgment unless the penalty exceeds the range of permissible punishment specified by statute or regulation or unless the penalty is so harsh and unconscionably disparate to the offense that it amounts to an abuse of discretion. *Id.* at 1116. Thereafter, in *Lachance v. MSPB*, 178 F.3d 1246 (Fed. Cir. 1999), the Court of Appeals addressed the issue of what authority the Merit Systems Protection Board has to mitigate a penalty. In *Lachance*, the Navy terminated an employee – Larry Devall - based upon two allegations of misconduct: (1) sexual

harassment in the form of leaning over a female co-worker, brushing up against her and touching her buttocks; and (2) watching television for 20 minutes while on duty. The AJ found that the second charge was *de minimus* and reduced the penalty to a 30-day suspension. The Federal Circuit examined the statutory language (which was not helpful) and the legislative history (which provided only slightly more guidance). Ultimately, the Federal Circuit promulgated the following rule:

> When an agency brings several charges, some more and some less egregious, and the more egregious charges are sustained, it is reasonable to presume absent agency indications to the contrary, that the agency itself would have imposed the same penalty on the basis of the sustained charges that it chose on the basis of the combined charges.
>
> * * *
>
> When the Board sustains all of an agency's charges, the Board may mitigate the agency's penalty to the maximum reasonable penalty only if it finds the agency's penalty was too severe. See *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999)

The Petitioner requests review of the AJ's refusal to mitigate the penalty of removal. As a matter of law, the Agency's chosen penalty of removal is unduly harsh and severe; therefore, the Court of Federal Appeals committed reversible error in sustaining the Board's decision. Benjamin

respectfully avers that the decision should have been mitigated to something less than removal. Indeed, in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), the Merit Systems Protection Board held that, in reviewing a disciplinary action, the Board should examine whether the penalty was reasonable under the circumstances: "Before it can be properly concluded that a particular penalty will promote the efficiency of the service, it must appear that the penalty takes reasonable account of the factors relevant to promotion of service efficiency in the individual case." *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 303 (1981)

Ultimately, the Petitioner maintains that her conduct does not warrant removal and indeed, the penalty of removal is unreasonable as a matter of law. The following facts support this argument:

1. The record showed that, while working as a grant and agreements specialist, Benjamin appropriately serviced and managed approximately 240 agreements with scientists, universities, and foreign entities.

2. There is insufficient evidence as to nexus (as explained above).

3. Benjamin has a long period of federal service, and according to her co-workers who testified at the hearing - Wycoff, Cradle, Taniguchi and Phelps - she was good at her job.

4. The misconduct was de minimis. For example, the AJ found that Benjamin had made unusual facial expressions and that Benjamin's status reports did not comport with her Agency's requests. However, at the time of her removal, Benjamin went to work each day and performed her duties.

5. While she was on a Performance Improvement Plan, Benjamin did not miss a single scheduled meeting – strong evidence that she was intent on complying with her supervisor's requests.

6. The AJ's decision alludes to the fact that there was prior discipline. However, much of the prior discipline was over two years old (with the exception of a suspension, which was being challenged before the EEOC).

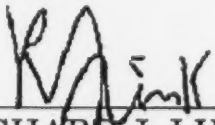
Pursuant to the provisions of Rule 14 of the Supreme Court Rules of Procedure, Adeline Benjamin, the Petitioner herein, respectfully requests this Court to grant a Writ of Certiorari in the instant case. The record does not reveal how or why the penalty of removal was reasonable in the facts and circumstances of this case. The Federal Circuit and the Merit Systems Protection Board appear to apply extraordinary deference to the Agency's choice of penalty. However, it is fundamentally the providence of the judicial branch of government to explain the bounds of

reasonableness. If judicial review is to make any sense, the Courts should lay down guidelines clarifying (and limiting) the manner that the discretion is exercised. Indeed, 5 U.S.C. § 7703(c) does mandate judicial review where the decision of the MSPB is arbitrary, capricious, an abuse of discretion, or *not in accordance with law.* (emphasis added)

CONCLUSION

As the foregoing demonstrates, in the case *sub judice*, Benjamin maintains that there is direct evidence of retaliation. If this Court grants certiorari, the Court will be afforded the opportunity to: (1) clarify the law as to what quantum of evidence is necessary is necessary to prove nexus to the efficiency of the service under 5 U.S.C. § 7513; and (2) expound on the law as to when the removal of a federal employee is unduly harsh or severe; i.e. what is a reasonable penalty under the law.

WHEREFORE, the premises considered, your Petitioner prays that this Court grant the Writ of Certiorari.



RICHARD J. LINK
Counsel for Petitioner
200-A Monroe Street
Suite 330
Rockville, MD 20850
(240) 453-9191

APPENDIX

[Entered: October 8, 2008]

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-3330

ADELINE B. BENJAMIN,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Richard J. Link, Jr., Karpel & Link, of Silver Spring, Maryland, argued for petitioner.

Tara K. Hogan, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent. With her on the brief were Jeffrey S. Bucholtz, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Todd M. Hughes, Deputy Director. Of counsel on the brief was Alan B. Robinson, Branch Chief, Employee Relations Branch, United States Department of Agriculture, of Beltsville, Maryland.

Appealed from: Merit Systems Protection Board

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-3330

ADELINE B. BENJAMIN,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Judgment

ON APPEAL from the Merit Systems Protection Board

In CASE NO(S). DC0752060891-I-1.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam (RADER, SCHALL, and PROST, Circuit Judges).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED: October 8, 2008

/ s / Jan Horbaly
Jan Horbaly, Clerk

[Entered August 10, 2007]

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ADELINE B. BENJAMIN,

Appellant,

DOCKET NUMBER
DC-0752-06-0891-I-1

v.

DEPARTMENT OF
AGRICULTURE,

Agency.

Richard J. Link, Esquire, Silver Spring, Maryland, for the appellant.

Alan B. Robinson and Avious-Wendy K. Lawrence, Beltsville, Maryland, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for

consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F .R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113*

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(l) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

---

* Because the initial decision did not provide the appellant with notice of her further mixed-case appeal rights in connection with her retaliation claim, we provide her with that notice in this Order.

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as

well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

/s/
Matthew D. Shannon
Acting Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this Order was sent today to each of the following:

Certified Mail	Richard J. Link, Esq Law Office of Curtis J. Karpel 8601 Georgia Avenue, Suite 905 Silver Spring, MD 20910
U.S. Mail	Adeline B. Benjamin 11222 Cherry Hill Road, #302 Beltsville, MD 20705-3827
U.S. Mail	Alan B. Robinson Department of Agriculture ARS, AFM, HRD, ERB 5601 Sunnyside Avenue, Room 31190A Beltsville, MD 20705-5102 Avious-Wendy K. Lawrence Department of Agriculture 5601 Sunnyside Avenue Beltsville, MD 20705-5102
August 10, 2007 (Date)	/s/ _____ Jacqueline Wilson Paralegal Specialist

[Entered: January 24, 2007]

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

ADELINE B. BENJAMIN,

Appellant,

DOCKET NUMBER
DC-0752-06-0891-I-1

v.

DEPARTMENT OF
AGRICULTURE,

Agency.

Richard J. Link, Esquire, Silver Spring, Maryland, for the appellant.

Alan B. Robinson and Avious-Wendy K. Lawrence, Beltsville, Maryland, for the agency.

BEFORE
Daniel Madden Turbitt
Administrative Judge

INITIAL DECISION

On September 25, 2006, Adeline B. Benjamin filed a timely appeal from the action taken by the Department of Agriculture to remove her from the GS-1101-12 position of Grants and Agreements Specialist, effective September 8, 2006. The Board has jurisdiction over this appeal pursuant to 5

U.S.C. §§ 7511-7513; 39 U.S.C. § 1005(a). At the appellant's request, a hearing was held. Based on the following analysis and findings, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The appellant was employed in the competitive service as a non-probationary employee with the agency's Agricultural Research Service (ARS), Administrative and Financial Management (AFM), Extramural Agreements Division (EAD), Grants and Agreements Management Staff (GAMS), in Beltsville, Maryland. The EAD's mission is to work in partnership with the ARS, the Economic Research Service, the National Agricultural Statistics Service, and the public by meeting their needs in the administrative management of grants, cooperative agreements and other extramural arrangements through the delivery of responsive and effective services. The EAD accomplishes its mission through policy and administrative review to assure the appropriate level of management oversight is conducted as well as through operational review of the development, clearance, maintenance and approval of extramural agreement programs.

The appellant served continuously with ARS from August 28, 1988, until her separation in 2006. She was employed as a Grants and Agreements Specialist, GS-1101-12, in the EAD from October 11, 1998, until her removal, effective September 8, 2006. *See* Appeal File (AF), Tab 4, Subtab 4a.

By proposal letter dated July 25, 2006, Sherri L. Carroll, GAMS Chief, proposed to remove the appellant from her position for: (1) Failure to Follow Supervisory Instructions; and (2) Repeated Acts of Disrespectful Conduct toward Your Supervisor. In the proposal letter, the appellant was afforded an opportunity to make an oral and/or written reply to the proposed action to the deciding official. She also was informed of her right to representation and she was instructed to contact the agency to request a copy of the material relied upon to support the reasons given in the notice of proposed action. *See id.*, Subtab 4b. The appellant's attorney submitted a written response to the proposed action. *See id.*, Subtab 4e.

By letter dated September 8, 2006, EAD Director Curtis Wilburn, Jr. informed the appellant that both charges were sustained and he determined that the penalty of removal was warranted under the circumstances. *See id.*, Subtab 4b. The appellant then filed this appeal.

The agency bears the burden of supporting its action by a preponderance of the evidence.

On appeal, the agency bears the burden of supporting its action by a preponderance of the evidence. *See* 5 C.F.R. § 1201.56(a). A preponderance of the evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.56(c)(2).

The first charge of "Failure to Follow Supervisory Instructions."

The Board has long held that employees do not have an unfettered right to disregard supervisory instructions; rather, an employee must obey the agency order, even if she believes it to be improper, and protest the propriety of the order later. *See Howarth v. U.S. Postal Service*, 77 M.S.P.R. 1, 7 (1997).

The proposal notice listed 10 specifications in support of this first charge.[1] As to the first specification, the notice letter stated the following:

> Specification 1
>
> On May 16, 2006, [Carroll] provided you a letter extending your 2005 performance period for an additional 90 days. In the letter [Carroll] advised you that your performance was less than "Fully Successful" in Critical Elements (CE) III, Extramural Agreements Administration Responsibilities; and CE IV, Communications, Special Assignments and Support. The letter provided instructions for you to follow during the 90 day extension period with regard to reporting your close out

[1] In addition to my factual findings on the specifications, I provided an analysis of the credibility determinations I used while reviewing the specifications, which is located at the end of the section discussing the charges.

activities and your weekly work status. For reporting close-out activities the following information was required:

(1) Gather all expired files from your cabinets, in addition to the ones being stored in boxes behind your desk. (2) Organize the files by Fiscal Year, then sequentially by agreement number. (3) Compile a list of all expired agreements in your possession to include the (a) Agreement number; (b) Name of Cooperator; (c) Balance of unexpended funds by accounting line; and (d) Dates of every action you initiated to officially close the agreement (i.e., dates of phone calls made, to whom and what was discussed, dates of correspondence/e-mail messages sent, describing who you sent the message to and what was requested).

[Carroll] provided this instruction because none of your monthly or weekly status reports for CY 2005 contained any close out information. [Carroll] advised you of this deficiency in your performance during the mid-year rating conducted on September 27, 2006[2]. [Carroll] assigned a due date for receipt of your close out report of May 30, 2006, at which time [she] would review the

[2] This date is incorrect. It should be September 27, 2005.

> status of the close out actions and provide further guidance as necessary to effect close out of each of the expired files. On May 30, 2006, you provided your list of pending close out activities. However, it was unsatisfactory. Specifically, you failed to provide balances of unexpended funds by accounting code; you failed to provide the dates of each of your attempts to close the file; and, you failed to provide dates of phone calls made, to whom the call was made, what was discussed, dates of correspondence/e-mail messages sent, describing to whom you sent the message and what was requested. Therefore, you failed to follow supervisory instructions.

AF, Tab 4, Subtab 4g.

In the appellant's written reply to the proposal letter, she denied that she failed to follow supervisory instructions. She also indicated that she complied with all agency rules, regulations, policies, and procedures in performing her job. In addition, she stated that she maintained her performance in Critical Elements III and IV at an outstanding level because she provided excellent customer service and

completed and submitted her reports assignments in a timely manner. AF, Tab 4, Subtab 4e.

Myles Taniguchi provided an affidavit on behalf of the appellant. He averred that he is employed by the agency as the Location Administrative Officer for the agency's Pacific Area ARS in Hilo, Hawaii. He has never met the appellant in person, but knows her because she is the designated Specialist for the Pacific Area. During the time Taniguchi has worked with the appellant, they have communicated via telephone, facsimile, or e-mail, usually about once per month. He stated that, in his opinion, the appellant is experienced and professional. He has never known her to be difficult or obstinate. Taniguchi, though, has no personal knowledge as to how the appellant interacted with her supervisors. He also pointed out that he interacted with the appellant on two agreements where there were some problems, although he did not single out the appellant as the person to blame for those problems. AF, Tab 9.

At the hearing, Sherri L. Carroll testified that the events as described in the notice of proposed removal were truthful and consistent in all material respects with her memory of the incidents that led to the appellant's removal. She, therefore, incorporated her testimony by way of reference with the statements that are contained in the notice letter for this and all other specifications supporting the first charge.

In addition, Carroll testified that, since 2002, she has supervised between five to six employees,

including the appellant. Carroll confirmed that, on May 16, 2006, she wrote a Letter of Deficiency to the appellant, warning her that her performance was deficient and the possible consequences of her continued poor performance. She provided the appellant with an opportunity to improve her performance in two critical elements. AF, Tab 4, Subtab 4mmm.

As to the close out reports detailed in the specifications, Carroll explained that every agreement has a life span and so each agreement has a close out, which a Specialist, such as the appellant, must record by way of a report. She noted that, at the end of a contract, Specialists who are working on cooperative agreements and some grants must ensure that final payments are made and that such payments are noted in the close out file.

Carroll testified that, as indicated in her Letter of Deficiency, she had prior discussions (on September 27, 2005), with the appellant about her performance during her mid-year review. At that time, Carroll expressed her concern that the appellant was not working at an acceptable level under Critical Element III with regard to her agreement close out responsibilities. She told the appellant that she was deficient and said she needed to bring her performance up to the successful level. Carroll also directed the appellant to prepare a complete list of all expired files and to give her the status on each close out action.

Carroll explained that the agency's policy is to ship all files that are over six months old to the

records center. Carroll indicated that the appellant had stored a very large amount of files containing expired agreements behind her desk for years. Despite being asked to do so, the appellant refused to put her files with the files of her colleagues that were going to be sent to the records center. Carroll related that she was trying to ascertain which of the appellant's files were still pending and which ones needed to be forwarded to the records center.

Carroll said she discussed Critical Element IV with the appellant, and told her that she was deficient in this area, too. According to the Deficiency Letter, under Critical Element IV, the appellant was directed to "communicate with the Chief, GAMS and/or the Division Director as appropriate, comments, recommendations, decision papers, and other documentation as may be required relating to major issues or concerns impacting extramural agreement policy." AF, Tab 4, Subtab 4mmm. After Carroll provided the appellant with the Deficiency Letter, her overall performance still did not improve, except that she did improve somewhat under Critical Element III.

According to Carroll, one of the biggest problems she had in supervising the appellant was that she "spoke to no one." More specifically, the appellant did not communicate with Carroll or any of her colleagues within EAD. Furthermore, Carroll's interactions with the appellant were limited because of the negative way the appellant responded to her whenever she asked the appellant for something. Whenever Carroll talked to the appellant, the appellant refused to listen to her and instead

demanded that Carroll communicate to her in writing. Carroll told the appellant that this was unacceptable. The only time that Carroll became aware of problems with the appellant was when others complained about the appellant.

On cross-examination, Carroll clarified that she did not remove the appellant based on her poor performance; but, rather, because of her misconduct. Carroll stated that she disagreed with the appellant's assertion in her pleadings that she is only required to service her customers' needs. According to Carroll, the appellant also is required to comply with her supervisor's instructions.

Carroll indicated that she issued the proposal letter on July 25, 2006, because, by that point, the appellant's conduct had become increasingly unacceptable. The appellant, said Carroll, continued to repeatedly refuse to comply with her instructions and she became even more disrespectful and disruptive to her and others in the workplace. Hearing Tape 1, Sides A & B.

Michael Wycoff testified on behalf of the appellant. He stated that he is the Head of Procurement and Contracting for ARS in Beltsville, Maryland. He has known the appellant for about 15 years. From 1992-98, he was the appellant's supervisor. He indicated that, when the appellant worked for him, she was respectful to his authority and she performed her duties well. She also never engaged in any misconduct that resulted in any disciplinary action. He said that he never had any difficulty in communicating with the appellant, but

he admitted that they did not have a lot of interaction because he dealt with contracts, whereas she handled agreements. *See* Hearing Tape 2, Side B.

Heather Phelps testified that she has been a Program Analyst with the agency since 1990. She has worked with the appellant for approximately three to five years in the field of international agreements. During that time, she and the appellant interacted nearly everyday together. She explained that she works with the appellant on cooperative agreements and that the appellant was "our liaison" for those agreements. Phelps has never seen the appellant react to others poorly. She also has never heard the appellant raise her voice to anyone. Phelps has never had any difficulties communicating with the appellant. She certainly thinks the appellant is "a team player" who sometimes "went above and beyond the call of duty."

Phelps talked about what became of a check connected with one of the agreements she worked on with the appellant, the South African Agreement. She said that she wrote a memorandum about the agreement because the appellant asked her to do so. The appellant told her that her supervisor was asking her about this and implying that she had done something wrong. Phelps did not, however, have any idea what the appellant's supervisor was accusing the appellant of having done. AF, Tab 5, Appellant's Exhibit M.

Nevertheless, Phelps acknowledged that she does not supervise the appellant. She also conceded

that she has no first-hand knowledge about any of the events that relate to the charges that were lodged against the appellant in these proceedings. Hearing Tape 3, Side A.

Angel Cradle testified that she works as a Budget Analyst with the agency's Budget Program Management Staff. Cradle has known the appellant for five or six years. During that period, she has interacted with the appellant sometimes as much as once a week or as little as once a month. Cradle believed the appellant was always respectful and professional while performing her job responsibilities. Cradle has never heard the appellant be boisterous or loud in any way. About five years ago, the appellant spent three weeks completing a report for the Budget Office. She did an excellent job. From Cradle's observations, the appellant was pleasant in her interactions with others and she seemed to be a team player. Cradle has never heard of anyone complain about the appellant.

Cradle, though, readily admitted that she has never seen the appellant interact with her supervisors or managers. Similarly, Cradle has never had any direct supervisory control over the appellant. While Cradle has heard about certain facts that led up to the appellant's removal, she disclosed that she only has obtained such information "through the grapevine." Hearing Tape 3, Side A.

The appellant emphasized that she "always follow supervisors' instructions" and that she is

always professional on the job. She indicated that she dealt with scientists and foreign entities as part of her job duties. She explained that she serviced about 240 customers, who are also known as "cooperators." She said that she has never received any complaints from the individuals or groups that she serviced.

The appellant denied that she failed to follow her supervisor's instructions, inasmuch as she met with Carroll every Thursday at 9:00 am., as directed. For the weekly meetings, the appellant would arrive at Carroll's office. She then would give Carroll the weekly report. She said that she would not even sit down in Carroll's office because Carroll would tell her to leave.

The appellant also denied that she failed to communicate the status of her cases to Carroll. She believed that she kept Carroll informed about the processing of all her agreements. She said that she provided bi-monthly (twice per month) reports, weekly reports, and "any other reports requested by management." She said that she compiled all the reports that Carroll requested from her. She also indicated that she never missed any of the deadlines for the weekly status reports and that she always provided them to Carroll in a timely manner. She emphasized that, if Carroll "asked for it, [she] provided it." In the appellant's opinion, she provided all of the information that Carroll requested and she considered the information to be accurate.

The appellant complained that no one in the office would talk to her. The only exception to that is

when Carroll chose to come to her office to "scream" at her. She related that she only talks to Carroll in "urgent situations." She said that she had to send all of communications to Carroll by e-mail, implying that she was doing this at management's behest. Subsequently, however, she stated that it was she who asked people to put things in writing for her "to make things clear." She said that she always politely asked others, "Please put it in writing so I can understand what it is you're asking."

The appellant conceded that "they had some problems" with the South African Agreement. *See* AF, Tab 5, Appellant's Exhibit M. She indicated that there were problems with the checks in that case. She pointed out that she is responsible for handling agreements, and not the checks. The appellant said she "had no idea" she was being accused of holding checks. Hearing Tape 3, Sides A & B; Hearing Tape 4, Side A.

Reviewing the testimony and evidence on this specification, I find that the appellant did not provide the specific information requested by Carroll, as set forth in the May 16, 2006 Deficiency Letter, which extended the appellant's performance improvement period by 90 days. *See* AF, Tab 4, Subtabs 4ee, 4mmm.. The agency thus demonstrated that the appellant failed to follow supervisory instructions. Consequently, I find Specification 1 is sustained.

As to the second specification of this first charge, the agency alleged:

Specification 2

On May 16, 2006, in the same letter referenced in Specification 1, [Carroll] instructed you to provide the following specific information in your weekly activity reports:

(1) List all pending actions (new assignments, amendments, payment requests, and close out action) that are currently in your possession for processing.

(2) For each action listed, you are to enter details pertaining to every action you have initiated since the date of receipt, i.e., dates of correspondence or e-mails to you from the Cooperator or the ARS, Authorized Departmental Designated Gfficer's Representative' (ADODR), dates of communications requesting additional information or status updates, including the name of the person you contacted.

(3) For actions pending receipt of additional information you are to document that you followed up with the contact person every week until the action is complete. Provide date, names of contact, and a detailed description of the conversation.

[Carroll] provided this instruction because [she] discovered while you were out of the office during the last 14-day suspension, February 6-20, 2006, you were not following established guidelines for submitting Non-funded Cooperative Agreements for review and approval. In addition, you failed to communicate with [Carroll] on an ongoing agreement issue which caused delays in providing funds to the ARS, South American Biological Control Laboratory. [Carroll] advised you this level of detail was necessary to provide [her] an up to date status of each of your agreement actions currently in progress. On May 25, 2006, you provided your list of pending actions. However, it was unsatisfactory. Specifically, you failed to document each action taken on the pending agreement or amendment from the date you received the action. You failed to provide dates of correspondence or e-mails sent to or received from the Cooperator or the ARS, Authorized Departmental Officer's Designated Representative (ADODR). You failed to provide dates of contacts, names of other personnel contacted and detailed descriptions of your efforts to follow up with your customers to obtain missing information or documentation that you

> previously requested. Therefore, you failed to follow supervisory instructions.

AF, Tab 4, Subtab 4g.

The appellant asserted, in her written reply, that her weekly activity reports were timely filed and she provided the requested information. She offered an August 4, 2006 memorandum from Heather Phelps, Program Analyst, and an email from Mary Lewis, Budget Analyst, to corroborate her case surrounding the negotiations with the ARS, Plant Protection Research Institute of the South American Agreement (58-4005-9-F131 and 58-0211-5-F029). AF, Tab 4, Subtab 4e.

Carroll testified that the events as described in the notice of proposed removal were truthful and consistent in all material respects with her memory of the incidents that led to the appellant's removal. She, therefore, incorporated her testimony by way of reference with the statements that are contained in the notice letter for this and all other specifications supporting the first charge.

In her testimony, the appellant denied the agency's allegations. She also offered the testimony of Wycoff, Phelps, and Cradle, who stated that, generally speaking, they believed that the appellant was a capable and pleasant worker.

I reviewed the testimony and evidence related to this specification. I find, based on that review, that the appellant failed to communicate with Carroll per Carroll's May 16, 2006 instructions in

the Deficiency Letter regarding the continuing agreement issue which caused delays in providing funds to the ARS, South American Biological Control Laboratory. *See* AF, Tab 4, Subtabs 4dd, 4ii, and 4mmm. Thus, I find Specification 2 is sustained.

Next, the agency provided Specification 3, which alleged as follows:

> Specification 3
>
> On May 31, 2006, [Carroll] sent you an e-mail instructing you to revise your close out report because it was unacceptable. Your revision was due on June 6, 2006, at 9 a.m. [Carroll] was out of the office on June 6, 2006. [She] held the meeting on June 7, 2006, at 9 a.m. upon [her] return to the office. Your revision was unsatisfactory. Specifically, you resubmitted an exact duplicate of the listing provided on May 30, 2006, with the exception of page 6. Page 6 of the report listed 12 agreements that were not included on the prior report. This report was unacceptable in that it was not in accordance with [Carroll's] reminder to you on May 31, 2006, of the requirement for this report. You again neglected to provide the dates of each of your attempts to close the file and you did not include the names of whom you contacted.
>
> When [Carroll] asked why you did not follow [her] instructions, and if

> you understood [her] instructions regarding the assignment, you stated you did not revise the list because the status provided was what you gathered from each file.
>
> On your report, you stated you requested specific information from Area Office Personnel (AOP), when [Carroll] asked when and whom the information was requested from, you stated that you had not made contact with anyone, and stated that you had gathered the information from the files. [Carroll] reminded you that your report stated you made contact with AOP and if what you were saying was true, then the report must have been fabricated. [Carroll] asked you if you were refusing to revise the report per [her] instructions. You said, "I'm not saying that." [Carroll] concluded the meeting by stating your report was unacceptable. To date, you have failed to provide an updated closeout report per [her] instructions above. Therefore, you failed to follow supervisory instructions.

AF, Tab 4, Subtab 4g.

In the appellant's written response, she argued that the close out report she submitted was acceptable and accurate. She further contended that she had no way of knowing what was expected of her

because of Carroll refused to mark the report for revisions. The appellant also indicated that Carroll advised the appellant that she "did not have to talk to her." AF, Tab 4, Subtab 4e.

Carroll testified that the events as described in the notice of proposed removal were truthful and consistent in all material respects with her memory of the incidents that led to the appellant's removal. She, therefore, incorporated her testimony by way of reference with the statements that are contained in the notice letter for this and all other specifications supporting the first charge.

In her testimony, the appellant denied the agency's allegations. She also offered the testimony of Wycoff, Phelps, and Cradle, who stated that, generally speaking, they believed that the appellant was a capable and pleasant worker. I find, based on what has been presented, that Carroll's May 31, 2006 e-mail to the appellant was explicitly clear on what she expected the appellant to do to revise her close out report. Despite the appellant's protestations to the contrary, she has not convinced me that Carroll refused to discuss this assignment with her. In addition, although the appellant complained that Carroll did not make written revisions on the report itself, Carroll, and not the appellant, had the right to choose the manner in how she should convey what she expected her subordinate employee to do. The appellant had no authority to dictate to her superior, Carroll, the form in which she wanted these' instructions. Finally, the appellant's submission was an exact duplicate of what she had provided earlier, except for one minor

change. AF, Tab 4, Subtabs 4w, 4z. The agency met its burden of proving that the appellant failed to follow supervisory instructions as set forth in Carroll's May 31, 2006 e-mail instructing the appellant to revise her CY 2005 weekly/monthly report. *See id.*, Subtab 4mmm. Hence, I find Specification 3 is sustained.

Regarding Specification 4, the agency argued that:

> Specification 4
>
> On May 5, 2006, [Carroll] gave you an assignment to provide weekly updates on the Ozone Fumigation of Coffee Leaf Rust project. Specifically [she] instructed you to provide weekly status updates, due each Friday, on this agreement until fully executed. You submitted status reports on this agreement that were exact duplicates of the previous report. [Carroll] advised you on June 22, 2006, that you were not to submit the same status report every week and instructed you to contact Myles Taniguchi, the Location Administrative Officer (LAO) at Hilo, [Hawaii] to obtain the status on the agreement from the research scientist who was responsible for entering documentation into the Agricultural Research Information System (ARIS). Mr. Taniguchi responded directly to [Carroll] that the ARIS documentation had not been entered. [Carroll] advised

> you that you should have provided this information in your status report, but you did not. Therefore, you failed to follow supervisory instructions.

AF, Tab 4, Subtab 4g.

In the appellant's written reply, she contended that she provided weekly updates on the Ozone Fumigation of Coffee Leaf Rust project. She noted that she provided a weekly update on this project every Friday, as instructed. In any event, she wrote that the progress of this project was "beyond her control" because "[t]here is no agreement in place" for this project. AF, Tab 4, Subtab 4e.

Carroll testified that the events as described in the notice of proposed removal were truthful and consistent in all material respects with her memory of the incidents that led to the appellant's removal. She, therefore, incorporated her testimony by way of reference with the statements that are contained in the notice letter for this and all other specifications supporting the first charge.

In her testimony, the appellant denied the agency's allegations. She indicated that she timely notified Carroll about the Ozone Fumigation of Coffee Leaf Rust project. She stated, too, that Carroll asked her to provide a weekly report on an agreement that did not exist because the scientists had not yet even given a proposal on the project. She stated that she spoke several times about this matter with Taniguchi, who told her there was no agreement in place. She also offered the testimony of

Wycoff, Phelps, and Cradle, who stated that, generally speaking, they believed that the appellant was a capable and pleasant worker.

Myles Taniguchi, in his December 4, 2006 affidavit, addressed this issue. He wrote that:

> I know that Ms. Benjamin had some input in the Coffee Ozone Fumigation/French Polynesia agreement. Ms. Benjamin corresponded with me approximately 5-6 times about this agreement in an attempt to obtain information/updates. This occurred in July or August 2006. I recall that there was some miscommunication in terms of finalizing the agreement (i.e. as to which document needed to be translated into French and as to who the communicating parties were).

AF, Tab 9. Taniguchi also wrote that, during the latter part of 2006, he encountered some difficulty with the appellant "in getting an agreement and/or billing completed." *Id.*

I find, notwithstanding the appellant's assertions that there was no agreement, she submitted status reports on this agreement that were the exact duplicates of her previous report Carroll provided the appellant with specific instructions on what was to be included on the status report. Even if it is true that the delay on this project was beyond the appellant's control, then she should have included this information in her weekly

updates to Carroll. I also have reviewed Taniguchi's sworn statement, and his comments on this matter were helpful, but not dispositive. In any event, I find the appellant failed (to include specific information on her status report as requested by Carroll. AF, Tab 4, Subtab 4, Subtabs 4n, 4nn. Therefore, the agency showed that the appellant failed to follow supervisory instructions as set forth in Carroll's May 5, 2006 assignment to provide weekly updates on the Ozone Fumigation of Coffee Leaf Rust project. I find Specification 4 is sustained.

As to Specification 5 of the first charge, the agency's proposal letter stated:

> Specification 5
>
> You provided a list of pending actions dated June 1, 2006, which was again, unacceptable because it was not in accordance with the written instructions given to you on May 16, 2006. Specifically, you failed to document each action taken on the pending agreement or amendment from the date you received the action. You failed to provide dates of correspondence or e-mails sent or received from the Cooperator or the ARS, ADODR and you failed to provide dates of contacts, names of other personnel contacted and detailed descriptions of your efforts to follow up with your customers to obtain missing information or documentation that you

> previously requested. Therefore, you failed to follow supervisory instructions.

AF, Tab 4, Subtab 4g.

According to the appellant's written reply, her list of pending actions submitted on June 1, 2006, was accurate and there was no discussion during the regular Thursday meetings. AF, Tab 4, Subtab 4e.

Carroll testified that the events as described in the notice of proposed removal were truthful and consistent in all material respects with her memory of the incidents that led to the appellant's removal. She, therefore, incorporated her testimony by way of reference with the statements that are contained in the notice letter for this and all other specifications supporting the first charge.

In her testimony, the appellant denied the agency's allegations. She also offered the testimony of Wycoff, Phelps, and Cradle, who stated that, generally speaking, they believed that the appellant was a capable and pleasant worker.

Considering the testimony and evidence on this, I conclude that that the appellant's June 1, 2006 list of pending actions was not completed in accordance with Carroll's instructions. AF, Tab 4, Subtabs 4u, 4v. Consequently, the agency demonstrated that the appellant failed to follow supervisory instructions as set forth in the May 16, 2006 Deficiency Letter. *See* AF, Tab 4, Subtab 4mmm. I find Specification 5 is sustained.

Turning to Specification 6, the agency asserted that:

> Specification 6
>
> On June 15, 2006, [Carroll] sent you an e-mail verifying [your] weekly meeting [with her] earlier that day. [She] asked you during the meeting if you revised your report as required in accordance with [her] instructions. You handed [her] your report and said the report was submitted for this week. [She] reviewed your submission which was not in accordance with the instructions given to you on May 16, 2006. Specifically, you failed to document each action taken on the pending agreement or amendment from the date you received the action. You failed to provide dates of correspondence or e-mails sent to or received from the Cooperator or the ARS, ADODR and you failed to provide dates of contacts, names of other personnel contacted and detailed descriptions of your efforts to follow up with your customers to obtain missing information or documentation that you previously requested. [Carroll] informed you that the information was unacceptable and [she] concluded the

> meeting. Therefore, you failed to follow supervisory instructions.

AF, Tab 4, Subtab 4g.

In the appellant's written response, she claimed that her June 15, 2006 report was accurate. She reiterated that there was no discussions with Carroll during the regular Thursday meeting. AF, Tab 4, Subtab 4e.

Carroll testified that the events as described in the notice of proposed removal were truthful and consistent in all material respects with her memory of the incidents that led to the appellant's removal. She, therefore, incorporated her testimony by way of reference with the statements that are contained in the notice letter for this and all other specifications supporting the first charge.

In her testimony, the appellant denied the agency's allegations. She also offered the testimony of Wycoff, Phelps, and Cradle, who stated that, generally speaking, they believed that the appellant was a capable and pleasant worker.

Reviewing the relevant material on this, I have determined that the list of pending actions the appellant provided to Carroll on June 15, 2006, was unsatisfactory because it was incomplete. AF, Tab 4, Subtab 4o. The agency proved that the appellant failed to follow supervisory instructions as set forth in the May 16, 2006 Deficiency Letter. *See id.*, Subtab 4mmm. Thus, I find Specification 6 is sustained.

As to Specification 7, the notice letter reflected that:

> Specification 7
>
> On June 22, 2006, you provided a list of pending actions that was unacceptable and not in accordance with written instructions given to you on May 16, 2006, and which you were reminded of on June 8, 2006. There was no indication of how many close out actions were completed or status of your attempts to close any of your expired agreements. When [Carroll] inquired about how many agreements were closed during the previous week you responded only that you were "working on them." [Carroll] advised you that your report was unacceptable. Specifically, you failed to provide balances of unexpended funds by accounting code; you failed to provide the dates of each of your attempts to close the file; and, you failed to provide dates of phone calls made, to whom the call was made, what was discussed, dates of correspondence/e-mail messages sent, describing who you sent the message to and what was requested. Therefore, you failed to follow supervisory instructions.

AF, Tab 4, Subtab 4g.

The appellant, in her written reply, argued that her June 22, 2006 report was accurate and that

Carroll did not discuss anything with her during the Thursday meetings. AF, Tab 4, Subtab 4e.

Carroll testified that the events as described in the notice of proposed removal were truthful and consistent in all material respects with her memory of the incidents that led to the appellant's removal She therefore, incorporated, her testimony by way of reference with the statements that are contained in the notice letter for this and all other specifications supporting the first charge.

In her testimony, the appellant denied the agency's allegations. She also offered the testimony of Wycoff, Phelps, and Cradle, who stated that, generally speaking, they believed that the appellant was a capable and pleasant worker.

Again, I must agree with the agency that the list of pending actions the appellant provided to Carroll on June 22, 2006, was unsatisfactory. AF, Tab 4, Subtabs 4m, 4s. Hence, the agency demonstrated that the appellant failed to follow supervisory instructions as set forth in the May 16, 2006 Deficiency Letter. *See id.*, Subtab 4mmm. 1 find that Specification 7 is sustained.

Furthermore, the agency argued that, pertaining to Specification 8:

Specification 8

On June 1, 2006, [Carroll] implemented written procedures to be followed by all GAMS Specialists with regard to covering the Agreements Information Management System (AIMS) Helpdesk.

[She] assigned specific duties to each specialist including you. Your assignment was to check the AIMS Helpdesk mail box twice daily, consult with either Kim Hicks, Grants and Agreements Analyst or Bernadette Gregor, Extramural Agreements Specialist, to determine if any issue needed to be reported directly to the Office of Chief Information Officer (Oero), provide an appropriate response to messages received from the customers in your assigned servicing areas (Pacific West Area (PWA), Midwest Area, North Atlantic Area (NAA), Headquarters (HQ) Office of International Research Programs), and to provide back-up support for Ms. Gregor's assigned area during her assignment. Ms. Gregor is responsible for servicing the ARS-HQ, Office of the Administrator and National Program Staff.

On June 8, 2006, you responded directly to a request for help received from the Beltsville Area. This is not in your assigned area of responsibility and

> the Specialist responsible was available at the time you chose to assist Beltsville. Therefore, you failed to follow [Carroll's] instructions.

AF, Tab 4, Subtab 4g.

The appellant asserted, in her written reply, that she did not refuse to cover the Agreements Information Management System (AIMS) Helpdesk. She added that she could not recall this incident clearly because she had an appointment out of the office on the date in question nevertheless, she maintained that it was illogical for the agency to criticize her for not being a "team player," when, at the same time, the agency claimed that she was assisting a customer who was not in her area of responsibility. AF, Tab 4, Subtab 4e.

In her testimony, the appellant stated that she was a "team player" and followed supervisory instructions regarding the Helpdesk. She also offered the testimony of Wycoff, Phelps, and Cradle, who stated that, in their opinion, the appellant was a "team player."

The agency provided some evidence on this matter, including an e-mail the appellant sent to a customer in the Helpdesk on June 8, 2006. *See* AF, Tab 4, Subtabs 4t, 4bb. The agency also tried to support this specification with general testimony (most notably, from Kim L. Hicks) that it believed the appellant was not, as she claimed, a "team player." However, the evidence, absent more, is insufficient to establish if the appellant did or did

not follow Carroll's instruction on the Helpdesk. Additionally, the agency failed to offer any testimony to refute the appellant's assertions that she followed supervisory direction concerning her actions on June 8, 2006, in response to a request from the Helpdesk.

Therefore, I find Specification 8 is not sustained. The agency did not show that the appellant failed to follow supervisory instructions as set forth in the June 1,2006 memorandum covering the AIMS Helpdesk.

Next, the proposal letter stated that, as to Specification 9:

> Specification 9
>
> On June 23, 2006, you did not follow written procedures with regard to covering the AIMS Helpdesk. Specifically, you were instructed to access the AIMS Help mailbox, discuss the issue presented with Ms. Hicks or Ms. Gregor to determine if a problem needed to be forwarded to the OCIO, and provide a status update via e-mail to the requestor on a daily basis if the issue could not be resolved within 1 business day.
>
> A message was sent to the AIMS Helpdesk mailbox from a user in your assigned area of responsibility (NAA), You provided no indication of what actions you took to resolve the user's issue. [Carroll] asked if you consulted

> with OCIO prior to discussing the issue with Ms. Hicks. You denied contacting the OCIO prior to discussing the issue with Ms: Hicks, but later stated that you had gone over to see an employee of the OCIO to resolve the issue. [Carroll] advised you that you had not followed the instructions provided in the June 1, 2006, memo which clearly stated that issues were to be discussed with Ms. Hicks and/or Ms. Gregor prior to involving the OCIO. Therefore, you failed to follow supervisory instructions.

AF, Tab 4, Subtab 4g.

In the appellant's written response to the notice letter, she insisted that she followed the June 1, 2006 written procedures regarding the AIMS Helpdesk. *See id.*, Subtab 4e.

The agency submitted two documents that relate to this specification. One of those documents contain a series of e-mails fromCarroll to the appellant. In which Carroll indicates that the appellant did not follow her June 1, 2006 instructions regarding the Helpdesk, which Carroll had to re-issue to the appellant twice since that date. According to the June 1, 2006 instructions, the process for handling Helpdesk inquiries was as follows:

> 1. Upon accessing the AIMS Help mailbox, each specialist will confirm receipt of the incoming message.

2. Discuss the issue presented with Kim Hicks or Bernadette Gregor (in Kim's absence) to determine if the problem needs to be forwarded to the OCIO, and take action accordingly.

3. Provide status updates via e-mail to the requester on a daily basis if the issue cannot be resolved in 1 business day.

4. Follow up with the OCIO on a daily basis any messages referred for action.

5. Provide a completion message to the user when the issue is resolved.

6. File the incoming request into the appropriate folder by Area, along [with] cc:'s of any sent messages to that user. AF, Tab 4, Subtabs 4l; 4bb.

Carroll testified that the events as described in the notice of proposed removal were truthful and consistent in all material respects with her memory of the incidents that led to the appellant's removal. She, therefore, incorporated her testimony byway of reference with the statements that are contained in the notice letter for this and all other specifications supporting the first charge.

Kim L. Hicks has worked with the appellant for a long time, either directly or indirectly, for the past 12 years. She acknowledged that she and the appellant have had "an adversarial relationship." She stated that the rupture in their relationship began after the appellant drafted a letter accusing Hicks of attacking her. But Hicks pointed out that she was eight months pregnant when the alleged attack occurred.

Hicks testified that she works as a Grants and Agreements Analyst for GAMS. Hicks said that she is not a supervisor over employees, but whenever Carroll is absent from the office, she is the Acting Chief of GAMS. In that respect, therefore, Hicks has been an acting supervisor over the appellant. In addition, Hicks had supervisory authority over projects, including two involving the appellant. One of those two projects was the AIMS Helpdesk Project.

Hicks explained that the Helpdesk was designed to accept the influx of inquiries the office realized it would receive as a result of questions concerning AIMS. She explained that, at the time, AIMS was a new systems database. She said that the system initially went on-line about five years ago, in a different version.

Hicks indicated that she designed a system to improve the AIMS Helpdesk. Hicks recalled that Carroll convened a meeting with the staff to explain the improvements. During that meeting, Carroll provided all of the employees with oral and written

instructions about their responsibilities for the Helpdesk. The Specialists were told that they were to provide oversight and that anything they could not handle themselves, they should come to Hicks and discuss. Carroll wanted each of the Specialists to handle the responsibilities. The appellant had several roles for the new AIMS Helpdesk Project, including answering Helpdesk e-mails, questions, and concerns.

Hicks was responsible for overseemg the process for the whole staff. Hicks, during this time, routinely went into the AIMS Helpdesk to observe the appellant's and others' work. Initially, Hicks did not observe anything that would have alerted her to the realization that the appellant was not doing her job and serving her customers (who are also called "cooperators" or "recipients") prior to the Helpdesk incident.

However, Hicks went into the Helpdesk and discovered that a message was sent to the AIMS Helpdesk mailbox from a user in the appellant's assigned area of responsibility. According to Hicks, the appellant provided no indication of what actions she took to resolve the user's issue, which was inappropriate. Hicks remembered that Carroll asked the appellant if she consulted with OCIO prior to discussing the issue with Hicks. At first, the appellant denied contacting the OCIO prior to discussing the issue with Hicks, but she later admitted that she had seen an OCIO employee to try and resolve the issue.

In her testimony, the appellant denied the agency's allegations. She also offered the testimony of Wycoff, Phelps, and Cradle, who stated that they considered the appellant to have been a capable and pleasant worker.

Based on my review of the evidence and testimony, I find that Carroll, in a June 1, 2006 memorandum, instructed the appellant to discuss any issues she may have on the Helpdesk with Hicks and/or Gregor prior to involving the acro. AF, Tab 4, Subtabs 4*l*, 4bb. The appellant did not do this. Thus, the agency showed that the appellant failed to follow supervisory instructions as set forth in the June 1, 2006 memorandum covering the AIMS Helpdesk. Consequently, I find Specification 9 is sustained.

The agency's proposal letter's remaining specification under the first charge states as follows:

> Specification 10
>
> On July 13, 2006, you reported for [your] scheduled meeting [with Carroll] at 9 a.m. You provided a list of pending actions which was unacceptable because it was not in accordance with the written instructions given to you on May 16, 2006. [Carroll] looked at the listing and explained that you were not providing [her] the appropriate amount of detail. [She] asked you if you understood your responsibility for reporting your actions and asked if you understood what [she]

was requesting. You stated, "Just say what you are going to say."

[Carroll] explained that the report was missing details such as receipt dates, names of personnel you spoke with or met with and details of your conversations on action taken. [Carroll] asked you again if you understood the assignment and if you had any comments. You did not reply.

[Carroll] continued the meeting by bringing to your attention that you had failed to communicate to [her] that you were involved in an issue with an agreement for PWA. On June 23, 2006, Laura Coontz, LAO, at Pullman, [Washington] e-mailed [Carroll] to ask for assistance in locating the funds that a sponsor provided for a fellowship for Dr. David Weller, Supervisory Research Plant Pathologist, Pullman, [Washington]. Ms. Coontz also indicated that this issue had first been reported to you by one of her employees in March 2006, you failed to provide [Carroll] this information on your weekly reports and during your weekly meeting with [her]. [Carroll] advised you that this was unacceptable. [She] asked if you had any comments regarding this, you did not reply.

> [Carroll] also pointed out that you are not following established procedures for updating all agreement actions on the EAD logbooks. [Carroll] advised you that this was unacceptable and asked if you had any comments, you did not reply. [Carroll] advised that all agreement actions were to be recorded into the EAD logbooks. As of July 6, 2006, you had not entered any of the amendments that you had processed for FY-06 (30 actions). You failed to enter all of your. invoices processed for FY-06 (you entered 2 of 41) and you failed to enter nine closeout actions completed in FY -06. Therefore, you failed to follow supervisory instruction.

AF, Tab 4, Subtab 4g.

The appellant contested this in her written reply. She stated that her list of pending actions submitted on July 13, 2006, was accurate and she reiterated that she and Carroll had no discussions during their regular Thursday meetings. She added that, regarding the Pullman Washington matter, she responded to the customer by explaining that the issue was budgetary in nature and so not something the EAD would handle. She indicated, however, that she referred the customer to the Area Budget and Fiscal Office for resolution and apprised that office of the situation. Concerning the logbooks, the appellant claimed that the documents were entered into the EAD logbooks. She complained, though, that because

the system is not secured or password protected, anyone could go in and make changes. AF, Tab 4, Subtab 4e.

The appellant proffered the status report that she submitted on July 13, 2006. AF, Tab 5, Appellant's Exhibit T. She stated that, for most of the cases noted therein, she is merely waiting for the cooperators' signatures. She explained that, before she closed out a file, she made sure that there was no funding left or lost on the government's part. She said that one of the office's goals is to spend all of the money allotted and to make sure it is spent. She added that, at the weekly meetings, Carroll never asked anything about this.

I find that the appellant's list of pending actions she provided to Carroll on July 13, 2006, was unsatisfactory. *See id.*; *see also* AF, Tab 4, 4k. The agency, therefore, demonstrated that the appellant failed to follow supervisory instructions as set forth in the May 16, 2006 Deficiency Letter. *See* AF, Tab 4, Subtab 4mmm. Thus, I find Specification 10 is sustained.

Credibility determinations for the first charge

The appellant's version of events is at odds with the agency's version of events. I must, therefore, determine the credibility of these witnesses to assess which version of events is more credible. *See Hillen* v. *Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (the factors to be considered in resolving credibility determinations), *modified*, 54 M.S:P.R. 58 (1992), *rev'd and remanded*

on other grounds, sub nom. King v. Hillen, 21 F.3d 1572 (Fed. Cir. 1994).

Based on the testimony and documentary evidence presented, I find it more probable than not that the appellant failed to follow her supervisor's instructions for nine of the ten specifications. All of the appellant's witnesses, except for the appellant herself, only provided general testimony about their interactions with the appellant, much of which was not relevant to the particular facts supporting the specifications in this charge.

I found the demeanor of the agency's witnesses to be straightforward and candid. Carroll and Hicks struck me as earnest and genuine. These witnesses' testimonies were also consistent with the voluminous documentary evidence contained in the record about the events in question. In contrast, I found the appellant's testimony to be highly implausible and her demeanor left me unconvinced that she was telling the truth. I also note that she appeared to contradict herself at points in her testimony, which diminished her overall credibility. Likewise, the appellant appeared overly defensive at times, especially when her veracity or memory were called into question. She also seemed implausible and denied any possible culpability for anything when she frequently stated that she "always" did this or that, such as follow instructions, when the overwhelming evidence showed the contrary was true. I believe that the appellant received valid orders from her superior officer, and that she disobeyed them. Accordingly, this charge is sustained.

The agency has met its burden of proving of proving the first charge.

With respect to whether this charge should be sustained, I note, first, that the Board's case law holds that agencies are not required to prove all the facts that it alleges in support of its charge. Rather, "where more than one event or factual specification is set out to support a single charge ... proof-of one-.or more, but not all, of the supporting specifications is sufficient to sustain the charge." *Burroughs v. Department of the Army*, 918 F. 2d 170, 172 (Fed. Cir. 1990). An agency is required to prove only the essence of its charge, and need not prove each factual specification supporting the charge. *Hicks v. Department of the Treasury*, 62 M.S.P.R. 71, 74 (1994), *aff'd*, 48 F.3d 1235 (Fed. Cir. 1995) (Table). Here, I have sustained nine out of the ten specifications concerning the failure to follow supervisory instruction charge. Hence, I find that the agency has proven by preponderant evidence that the appellant engaged in the improper conduct as charged. *See Royster* v. *Department of Justice*, 58 M.S.P.R. 495, 498 (1993).

The second charge of "Repeated Acts of Disrespectful Conduct toward Your Supervisor"

In the proposal letter, the appellant also was charged with "Repeated Acts of Disrespectful Conduct toward Your Supervisor." The agency's proposal letter, for all four specifications of this charge, indicated that:

> Disrespectful conduct as manifested by your facial expressions and demeanor is unacceptable and not conducive to a sound working environment. All employees, including you, are expected to comport themselves in conformance with accepted standards.
>
> AF, Tab 4, Subtab 4g.

As stated above, the agency brought forth four specifications in its proposal notice as to this second charge, including:

> Specification 1
>
> On May 18, 2006, at 9:00 a.m. you reported to [Carroll's] office and provided a status listing of pending agreements dated May 18, 2006. [Carroll] advised you that the listing was incomplete and explained that you had not complied with [her] instructions as outlined in the letter [she] delivered to you on May 16, 2006. While [Carroll] was explaining what was required, you began looking at [her] with a very unusual expression on your face, puckering your lips and leering at [her]. [Carroll] stopped [her] discussion and stated that she would not tolerate your behavior, [she] expected you to come to the weekly meetings and conduct yourself as a normal professional employee. At that point [Carroll] ended the meeting. Your

> actions continued to demonstrate your disregard for supervisory authority.

AF, Tab 4, Subtab 4g.

The appellant, in her written reply, wrote that she always displayed a professional demeanor. She added that it is she, in fact, who has been "the victim" of a lack of professional courtesy. AF, Tab 4, Subtab 4e.

Carroll testified that she and the appellant were supposed to meet weekly. She indicated that May 18, 2006 was the first scheduled date for these meetings to occur. The appellant reported to the meeting on May 18, 2006. Carroll recalled that she was about to tell the appellant that she had not met the requirements that had been provided to her, when the appellant started to act strangely. In particular, the appellant made faces and refused to answer any of Carroll's questions. The appellant also puckered her lips and leered at Carroll. According to Carroll, the facial expressions the appellant made at her during the May 18, 2006 meeting were "typical." The appellant, said Carroll, always looked at her with contempt and she "always had a look of hatred on her face" whenever she interacted with Carroll. Carroll, based on the appellant's actions and her refusal to pay attention to her instructions, decided to end the meeting.

Curtis Wilburn, Jr. testified that he was familiar with the appellant's defiant facial gestures. He noted that from October 1999 through 2001, he was the appellant's immediate supervisor. In. 2001,

due. to organizational restructuring within the office, Carroll became the appellant's first-line supervisor. When Wilburn directly supervised the appellant, he personally witnessed her giving him looks in an effort to intimidate him. he also remembered that she conveyed, through her "body language," attempts to intimidate his authority. He described her as being an uncooperative subordinate employee. Hearing Tape 2, Sides A & B.

The appellant testified that she met with Carroll in her office for the May 18, 2006 meeting. She declared that, when she arrived, Carroll had her back to her and then turned around, saying "Just look at you - you're so unprofessional." The appellant indicated that she was taken aback by this comment because she is always professional - in her dress and in her manner. She stated that she "would never dare" pucker her lips or make any facial gestures at Carroll. In fact, the appellant accused Carroll of making facial gestures at her. Carroll also did not discuss anything with the appellant during this meeting.

I find no merit to the appellant's assertions. After reviewing the testimony and the evidence upon which the proposal letter was based, AF, Tab 4, Subtabs 4kk, 4ll, I find Carroll's version of events more credible than the explanation provided by the appellant. My credibility findings for this charge are analyzed below. Therefore, Specification 1 is sustained.

Specification 2 of the second charge reflects that:

Specification 2

On May 31,2006, at 12:12 p.m;, [Carroll] sent an appointment to all GAMS specialists and Ms. Kim Hicks to attend a meeting to discuss coverage of the AIMS Helpdesk mail box at 3 p.m.

All attendees were present at 3 p.m. except for you. [Carroll] went to your cubicle shortly after 3 p.m. and you were not at your desk. [Carroll] returned to the conference room and explained to the other staff members that [she] would have to wait to start the meeting because [she] needed everyone present. After another few minutes, [she] returned to your cubicle to find you standing at your desk reading a piece of paper. [Carroll] announced that we were waiting for you to start the meeting. You responded that you'd be there in a moment. [Carroll] stated that the meeting was starting and that you were late. [She] left your cubicle, but you remained and resumed reading the piece of paper. Your actions continued to demonstrate your disregard for supervisory authority.

AF, Tab 4, Subtab 4g.

In her written reply, the appellant alleged that she reported to the meeting on time. AF, Tab 4, Subtab 4e.

Carroll testified that the proposal letter gave a "fair summary" of what occurred on May 31, 2006. She explained that, earlier, she had notified all Specialists and her Analyst, Kim Hicks, bye-mail to meet that day at 3:00 p.m. AF, Tab 4, Subtab 4gg. Carroll said that she needed everyone present so that she could explain to everyone the new procedures she was putting into place for coverage of the AIMS Helpdesk. She claimed that everyone else was in attendance at the meeting, save the appellant. Carroll and the others waited in the conference room for a few minutes to see if the appellant would eventually arrive for the meeting.

After the appellant did not show, Carroll then checked on her whereabouts. She said the appellant was not at her desk. In fact, she was not even in the office. When Carroll first searched for the appellant, she looked at the clock in the office, and she noticed it was several minutes after 3:00 p.m. Subsequently, Carroll checked for the appellant a second time and discovered the appellant reading a piece of paper at her desk. Carroll reminded the appellant about the meeting, and the appellant told Carroll she would "be there in a few minutes," even though she was already late. Carroll told the appellant she needed to be there "now." The appellant repeated that she would be there in a few minutes and she waited a few more minutes before arriving in the conference room.

The appellant testified that she recalled receiving Carroll's e-mail telling the staff about the meeting. She denied that she was late and insisted at least twice that, "As always, I attend my meetings on time." She remembered that, on the date in question, Carroll came up to her five minutes before 3:00 p.m. "just screaming and yelling." Then, the appellant recalled getting her "pad and pen" and replying to Carroll, "okay, let's go to my meeting." The appellant stated that it was untrue that she had a history of reporting late to meetings.

When asked on cross, the appellant refused to acknowledge that she somehow never mentioned that Carroll was yelling and screaming at her five minutes before the 3:00 p.m. meeting in her written summary to the proposal letter. AF, Tab 4, Subtab 4e. Her only reply to this question was that "I always attend my meetings on time!" She conceded that, when Carroll came up behind her and started yelling at her for being late, she neglected to tell Carroll that it was only five before 3:00 p.m.

After reviewing the testimony and evidence presented, AF, Tab 4, Subtab 4y, the facts do not support the appellant's assertion that she was on time for the meeting and that she acted in the manner she described. As I set forth in my credibility determinations below, I find the assertions made by Carroll to be more believable than those of the appellant. Thus, I find Specification 2 is sustained.

Turning to the third specification of this charge, the proposal letter stated:

Specification 3

On June 23, 2006, [Carroll] instructed you to meet with Kim Hicks to discuss an unresolved AIMS helpdesk request. Ms. Hicks called me after you entered her office and asked me to attend the meeting. When [Carroll] entered the office, you were standing over Ms. Hicks, who was seated in her chair, waving a piece of paper in her face. Ms. Hicks inquired if you had consulted any employee of the OCIO on the resolved request and inquired if you had taken any action before consulting her. [Carroll] asked you directly if you had consulted anyone in the OCIO, you ignored [her] question. [Carroll] repeated [her]self and you turned toward [her] and began grimacing at [her]. You ignored [her] question again, but later admitted that you had consulted the OCIO. [Carroll] informed you that you had not followed procedures which require consulting with Ms. Hicks or Ms. Gregor prior to contacting the OCIO. You stated that neither person was available and began giggling as you walked past [Carroll]. [Carroll] asked what was funny and you replied, "You are." Your actions continued to demonstrate your disregard for supervisory authority.

AF, Tab 4, Subtab 4g.

The appellant replied to the proposal letter by stating that the agency charged her with failing to. follow supervisory instructions to discuss an unresolved AIMS Helpdesk request, but that she did, in fact, discuss the issue with them. She declared that neither Carroll nor Hicks could respond to her request, but the OCIO could. She further related that she and Tonja Socks-Lee contacted the customer and serviced the problem. AF, Tab 4, Subtab 4e.

Hicks testified that, on the date in question, she received a communication from the appellant about a Helpdesk issue. Hicks then went to the desk of Tonja Socks-Lee, an employee within OCIO, about 1:00 p.m. to follow up on the matter. After Hicks explained the problem to Socks-Lee, she replied, "Oh, I've already spoken to someone - referring to the appellant - about that." Socks-Lee added that "It's just a printing problem." Hicks indicated that it was then that she learned for the first time that the appellant talked to Socks-Lee without Hicks' knowledge. Hicks said that the appellant should not have gone to the OCIO on her own.

Thereafter, the appellant entered Hicks' office waving a piece of paper, asking Hicks, "Are you going to take care of the problem?" Hicks replied, "No, but I'm going to help you take care of it." The appellant kept waving the piece of paper in Hick's face and repeated several times, "Are you going to take care of it?" The appellant was belligerent, argumentative, and insistent that Hicks should take care of the problem. When the appellant was waving

the paper at Hicks, she was right in Hick's face - only about a foot or so away.

Hicks telephoned Carroll and asked her to come to her office. When Carroll arrived, she asked the appellant, "Did you get my e-mail?" (referring to the June I, 2006 instructions and subsequent e-mails Carroll sent to the appellant on the Helpdesk process, specifically instructing Specialists to handle these matters). Hicks advised the appellant that the OCIO told her that the appellant needed to give additional information to Socks-Lee, and that is the reason why the problem was not taken care of. Then the appellant asked Hicks, "So that means you are going to take care of it?" Hicks answered, "I just told you. Do you want me to put it in writing?" The appellant said "Yes," laughed, and left Hicks' office. Carroll asked the appellant as she was leaving, "What are you laughing at? ," to which the appellant replied, "You" (referring to Carroll). Hicks said that Carroll did not make a face at the appellant as she was leaving Hicks' office.

The appellant recalled the date that Hicks "summoned" her into her office. The appellant said she arrived, as instructed. She remembered that the entire incident lasted no more than five minutes. She denied that she was ever close to Hicks, or that she waved any papers in Hicks' face. She indicated that she was standing approximately five feet away from Hicks. Afterwards, Hicks called Carroll and asked her to come into Hicks' office. When Carroll arrived, the appellant asked, "Is there a problem?" As the appellant was leaving, Carroll grimaced at her. The appellant did not laugh at Carroll, as stated

in the proposal letter. She stated that "I always have a smiley face," but she insisted that she did not laugh.

I find the appellant to be less than believable as to her assertions regarding this specification. As an aside, the agency did not, as the appellant asserted in her written reply, charge her with failure to follow supervisory instructions as to this matter. Instead, she was charged with "Repeated Acts of Disrespectful Conduct toward Your Supervisor." After reviewing the testimony and evidentiary record upon which this specification was based, AF, Tab 4, Subtab 4*l*, I find, as explained below, the agency's version of what occurred is more credible than the explanation provided by the appellant. Hence, I find Specification 3 is sustained.

Finally, this second charge had one last specification:

> Specification 4
>
> On July 13, 2006, you reported for [your] scheduled meeting [with Carroll] at 9 a.m. You provided a list of pending actions which was unacceptable because it was not in accordance with the written instructions given to you on May 16, 2006. [Carroll] discussed [her] expectations and concluded the meeting. You remained in your seat giving [her] a menacing look. [Carroll] stood and said again that the meeting was over and that you could leave, but

> you continued to stare menacingly at [her] and remained in your seat. [Carroll] then instructed you to leave [her] office at which time you stood up, walked toward the door and started giggling and grimacing at [her] then stated "Yes, I'll leave."

AF, Tab 4, Subtab 4g.

In her written reply, the appellant stated her list of pending actions submitted on July 13, 2006, was accurate. She added that during the weekly meetings, Carroll would refuse to look at her or discuss her weekly reports and Carroll would tell the appellant to "get out" of her office. The appellant claimed all this was done in an attempt to upset her. AF, Tab 4, Subtab 4e.

Both parties provided little more than general testimony on this subject. The appellant said that the weekly meetings with Carroll were short, and that Carroll would tell her to "get out!" soon after she arrived. I have reviewed the summary of the July 13, 2006 meeting, as prepared by Carroll, and Carroll's testimony in which she denied ever telling the appellant to "get out!" Based upon the review of the evidence and testimony before me, I find nothing to support the appellant's claim that Carroll took any action merely for the purpose of upsetting her. Rather, the evidence and testimony support the conclusion that the appellant's behavior was inappropriate and intolerable. Consequently, I find Specification 4 is sustained.

Credibility determinations for the second charge

The appellant denied that she acted in the manner ascribed to her for the four specifications of the second charge in the proposal letter. Carroll, Hicks, and Wilburn, however, in their testimony, averred that the appellant did act in a way that showed disrespect for authority. I find that Carroll's, Hick's, and Wilburn's version of events was more likely to have occurred than the version of events as described by- the appellant. Carroll's, Hick's, and Wilburn's recollection about what happened on these dates were consistent with each other, and they all seemed to agree that the appellant's actions were inappropriate and that what she did was disrespectful. . I cannot fathom why Carroll, Hicks, or Wilburn would have fabricated their accounts of what happened.

The appellant's testimony on these matters was consistent, in some respects, with what she stated in her written response to the notice of proposed removal. Her declaration that she was a pleasant, courteous, and co-operative employee was bolstered somewhat by the general assertions made by Wycoff, Phelps, and Cradle, in their testimony, discussed in the first charge (but also considered in the second). Nevertheless, I find the appellant's explanations about what happened to be less than believable. To that end, I note that the appellant depicted Carroll as a harassing supervisor bent on intimidating and destroying her. This characterization of Carroll did not accord with the calm, reflective, and reserved person who appeared before me at the hearing. If Carroll were as serious a menace as the appellant portrayed her to be, it

seems strange that the appellant was unable to get even one other individual to bolster her claim about Carroll on this. I thus do not find the appellant to be a believable witness. *See Hillen*, 35 M.S.P.R. at 458.

The agency has met its burden of proving the second charge.

Based on the testimony and documentary evidence before me, I find it more likely true than not true that the appellant acted as alleged under the four specifications of the second charge in the proposal letter. In light of this determination, I find that the agency demonstrated that the appellant engaged in repeated acts of disrespectful conduct toward her supervisor, Carroll. Consequently, I find that the agency has proven the second charge. *See Daigle v. Department of Veterans Affairs*, 84 M.S.P .R. 625, 628 (1999).

The appellant bears the burden of proving her affirmative defense by a preponderance of the evidence.

Notwithstanding my findings that the agency has supported its charges by preponderant evidence, the agency's action may not be sustained if the appellant shows that the action was based on a prohibited personnel practice. 5 U.S.C. § 7701(c)(2)(B). The appellant argued that the agency's disciplinary action was taken in reprisal for her prior *EEO* activities, a prohibited personnel practice under 5 U.S.C. § 2302(b)(9). The appellant bears the burden of proving this affirmative defense by preponderant evidence. *See* 5 C.F.R. § 1201.56.

The appellant has not shown that the agency's action was taken in reprisal for her previous EEO activities.

As an affirmative defense to the agency's action, the appellant alleged that the agency removed her in reprisal for her prior EEO activity. To demonstrate reprisal, an employee must show that: (I) she engaged in protected activity; (2) the proposing or deciding official knew of the activity; (3) the adverse action under review could, under the circumstances, have been retaliation; and (4) there was a genuine nexus between the retaliation and the action taken. *See Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986). An employee's protected activity must be established by preponderant evidence to be the "motivating factor" or the "real factor" for the agency's decision. *See Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268, 274 (1981).

At the hearing, the parties stipulated that the Equal Employment Opportunity Commission (EEOC) conducted several hearings involving complaints filed by the appellant. These hearings occurred on August 14-15, 2002; March 5-6,2003; and June 17,2003. *See* Hearing Tape I, Side B. The parties also stipulated to the following: Prior to her removal, the appellant had been involved in prior EEO activity, including Case #ARS-2006-0 1834, which was accepted for investigation on April 28, 2006. Carroll was the responding official. The issues in that case were related to the appellant's 14 calendar day suspension on February 6-19, 2006, for

failure to follow supervisory instructions. *See* AF, Tab 4, Subtab 4qq The appellant was involved in another previous EEO activity arising from a denial of overtime; a Letter of Reprimand; and a five-day suspension. (EEOC Case #120-A2-1245-X). Wilburn was the responding official. However, Carroll had been the appellant's acting supervisor and had been a witness at the EEOC administrative hearing held on August 14-15, 2002, and again on March 5-6, 2003, and June 17, 2003. In that matter, the EEOC issued its decision and the agency adopted its Final Agency Decision on or about September 23, 2003. The appellant timely filed suit in the U.S. District of Columbia on December 19, 2003. (Case #03-2584). The appellant filed suit under Title VII of the Civil Rights Act. The case was transferred to the U.S. District Court for the District of Maryland. (Case #05-175). The district court issued its decision on January 30, 2006, granting summary judgment in favor of the agency. The appellant timely filed an appeal to the U.S. Court of Appeals for the Fourth Circuit on February 25, 2006. (Case #06-1280). See AF, Tab 7 (Summary of Prehearing Conference, section 4, "Stipulations"). Based on the above, I find that the appellant has satisfied the first element of the reprisal test.

The parties also stipulated at the hearing that both the proposing and deciding officials knew about the appellant's prior EEO activity when they issued the notice of proposed removal and decision letter, respectively. *See* Hearing Tape 2, Side A. I find, therefore, that the appellant has satisfied the second element.

In her testimony, Carroll related that she was aware of the appellant's prior EEO activity. Carroll emphasized, however, that she did not issue either the Letter of Deficiency or the notice of proposed removal based on the appellant's prior EEO activity. She added that she still would have proposed the appellant's removal, even absent the appellant's previous EEO activity. Carroll did not know if the appellant ever named her as a discriminating management official in any of her EEO complaints. Carroll recalled providing an affidavit on July 6, 2002 to an EEO investigator regarding a 14-day suspension involving the appellant. *See* Appellant's Exhibit 7. Carroll maintained that this statement had no effect on her decision to propose the appellant's removal.

Wilburn also testified that, although he knew of the appellant's prior EEO activity, this activity had no impact on his decision to remove the appellant. Wilburn pointed out, in fact, that the appellant was hired in part based on Wilburn's "very strong recommendation" of the appellant to the selecting official. Wilburn indicated that he would have removed the appellant, even absent her prior EEO activity. The appellant, noted Wilburn, was removed because of the charges and specifications outlined in the proposal letter. Wilburn also related that the appellant did not receive the Deficiency Letter because of her prior EEO activity, but because she was not doing her job and she had several case files that were "quite overdue" for close out.

Hicks testified that she did not see or hear anything that would make her believe that either

Wilburn or Carroll treated the appellant any differently than other employees, due to her prior EEO activity. *See* Hearing Tape 1, Side B.

The appellant testified that she never had a discussion with Carroll about her EEO complaints. However, in approximately October 2005, Carroll and Hicks "came up behind" the appellant "screaming" at her and telling her that "they have determined that you have not been discriminated against." The appellant wondered how Carroll found out about the disposition of her EEO complaint. Carroll then asked the appellant, "What is your worth?," which the appellant deemed harassment.

Next, the appellant testified that, on the same date that Wilburn provided her with a copy of the decision letter in July 2006, she heard him talking about her EEO complaint. On cross, she said that she overheard Wilburn comment that "We are. going to move her out." When she was asked whether Wilburn specifically mentioned her EEO activity, she replied that, "They are always talking about the EEO claim." The appellant indicated that, after she was suspended for 14 days in 2006, she learned that Wilburn told the staff that, because of her EEO cases, she would not be returning to the workplace. She indicated that Wilburn always conversed with the staff, but never with her. Wilburn, she said, "did everything he could to get me out of the agency. When one action didn't work, they talked about getting another action."

To rebut a *prima facie* case of prohibited discrimination, an employer must present evidence

of its reasons for an action against an employee which raises a genuine issue of fact as to whether it discriminated against the employee, which is legally sufficient to justify a judgment for the employer, and which frames the factual issues with sufficient clarity so that the employee has a full and fair opportunity to demonstrate pretext. *Texas Department of Community Affairs* v *Burdine*, 450 U.S. 248, 255-57 (1981).

In light of the overwhelming evidence supporting the sustained charges against the appellant, I find no genuine nexus between her protected EEO activities and the removal. Based on this evidence, I find that the appellant's allegation does not establish a *prima facie* case of reprisal for engaging in EEO activities. *See New v. Department of Veterans Affairs*, 82 M.S.P.R. 609, 617-18 (1999). Consequently, I find that the appellant has failed to support her affirmative defense.

The sustained charges have a nexus or logical connection to the efficiency of the service.

After considering the record as a whole, I find that most of the appellant's misconduct occurred on the employer's premises, directly involved the appellant's supervisor, and clearly was destructive of the supervisor-employee relationship. *See Farris v. U.S. Postal Service,* 14 M.S.P.R. 568, 574 (1983). Accordingly, I find that her conduct has a nexus, or logical connection, to the efficiency of the service, and that the sustained charge warrants disciplinary action to promote the efficiency of the service. *See Merritt v. Department of Justice,* 6 M.S.P.R. 585, 596

(1981), *modified, Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 n.2 (1987).

The penalty imposed by the agency for the sustained misconduct is within the tolerable bounds of reasonableness and promotes the efficiency of the service.

Before it can be concluded that a particular penalty promotes the efficiency of the service, it must appear that the penalty takes reasonable account of all relevant mitigating factors in the particular case. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 303 (1981). In making such determinations, the Board gives due weight to the agency's primary discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's judgement but to assure that it has been properly exercised. *See id.* at 306.

Where, as here, the Board sustains all of an agency's charges, the Board may mitigate the agency's original penalty to the maximum reasonable penalty only if it finds the agency's penalty was too severe. *See Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999). The Board has determined that removal was a reasonable penalty for misconduct similar to that sustained in this case *See, e.g., Lednar v. Social Security Administration*, 82 M.S.P.R. 364, 372 (1999)(removal a suitable penalty for rude and discourteous behavior); *Wilson v. Department of Justice*, 68 M.S.P.R. 303, 309-10

(1995) (charge of disrespectful conduct warranted removal).

Curtis Wilburn, Jr. testified that he was the deciding official in this case Wilburn related that he reviewed the package of information regarding the charges and he considered the appellant's written communications disputing those charges. *See* AF, Tab 4, Subtab 4e. When asked why he sustained the penalty Wilburn replied that he did not believe the appellant's explanations about what happened, especially considering the overwhelming evidence against her Wilburn, in his testimony and decision letter, indicated that he considered the *Douglas* factors, *see id.*, Subtab 4c, but most especially the following: the, seriousness of the offenses; whether the penalty was consistent with the agency's table of penalties;[3] the appellant's extensive prior

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[3] The parties stipulated that the penalty of removal was consistent with the agency' Table of Disciplinary Penalties for the stated misconduct in cases where the employee had previously been subject to formal discipline and alternative penalties were no likely to correct the behavior. *See* AF, Tab 4, Subtab 4fff, at p. 17; AF, Tab (Summary of Prehearing Conference, section 4, "Stipulations").

disciplinary record,[4] and that her repeated misconduct after corrective and disciplinary measures did not indicate a likely potential for rehabilitation. Wilburns also considered the appellant's more than 18 years of service, her position, and her duties and responsibilities. He considered, moreover, the fact that agency management could no longer have trust or confidence in the appellant to do her job because (a) she could not be depended upon to comply with established policy and procedures and supervisory instructions, (b) she could not be expected to advise management on issues or problems she could not resolve or might otherwise affect customer services because she lacked the critical skill of open communication with colleagues and supervisors, (c) she refused to follow supervisory instructions on various issues affecting her workload, which meant that she could not properly exercise the considerable independent judgment entrusted to Specialists to protect the government's interests, (d) her disrespect for authority was unacceptable and not conducive to

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[4] The parties stipulated that: The appellant had been subjected to: (1) a Letter of Caution on August 2, 2000, for a verbal altercation with a fellow staff member (AF Tab 4, Subtab 4aaa); (2) a Letter of Reprimand on April 4, 2001, for failure to follow, supervisory instructions *(id.*, Subtab 4zz); (3) a five-day calendar suspension on October 31, 2002, for refusal to comply with supervisory instructions *(id.*, Subtab 4xx (4) a proposed 14 calendar day suspension on October 1, 2003, that was mitigated to a Letter of Reprimand for refusal to comply with supervisory instructions, uncooperative behavior, and neglect of assigned duties *(id.*, Subtab 4xx); and (5) a 14 calendar day suspension on February 6-19, 2006, for failure to follow supervisory instructions *(id.*, Subtab 4qq). *See* AF, Tab 7 (Summary of Prehearing Conference, section 4, "Stipulations").

a sound working environment, and (e) her uncooperative attitude became an obstacle to the agency's ability to accomplish its mission. Hearing Tape 2, Sides A & B; AF, Tab 4, Subtab 4b.

After considering the deciding official's explanation of his penalty selection, I find that he considered the relevant *Douglas* factors under the circumstances of this case. Concerning the appellant's prior disciplinary record, I find that, because she was informed of the actions in writing, the actions were a matter of record, and she was permitted to dispute the charges before a higher level of authority than the one that imposed the discipline, the Board's review of such actions is limited to determining whether those actions were clearly erroneous. *See Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981). Since the appellant has not contended that the disciplinary actions were clearly erroneous, I find that they weigh in favor of the penalty.

Upon review of the record, I find no basis to disturb the agency's chosen penalty under the sustained charges. I thus conclude that the deciding official's determination that the penalty of removal was warranted in this case was neither arbitrary, capricious, nor unreasonable and was for such cause as will promote the efficiency of the service. Finally, the appellant in this case has failed to express remorse at any time during the proceedings for her misconduct and that supports a finding that she is a poor prospect for rehabilitation. *See, e.g., Murry v. General Services Administration*, 93 M.S.P.R. 554,

558 (2003); *see also Shaw v. Department of the Air Force*, 80 M.S.P.R. 98,117 (1998).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

/s/
Daniel Madden Turbitt
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final; which is set forth below, is last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F .R. § 1201.1 12(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on **February 28, 2007,** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date

on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by

you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury *(see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is .the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code; section 7703 (5 U.S.C. § 7703). You may read this law;-as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

U.S. Mail Adeline B. Benjamin
11222 Cherry Hill Road, #302
Beltsville, MD 20705-3827

Appellant Representative

U.S. Mail Richard J. Link, Esq.
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Agency Representative

U.S. Mail Alan B. Robinson
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ARS, AFM, HRD, ERB
5601 Sunnyside Avenue
Beltsville, MD 20705-5102

U.S. Mail Avious-Wendy K. Lawrence
Department of Agriculture
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Beltsville, MD 20705-5102

January 24, 2007
(Date)

/s/
Marie Sumner
Paralegal Specialist

[Entered December 15, 2008]

Note: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-3330

ADELINE B. BENJAMIN

Petitioner,

v.

DEPARTMENT OF AGRICULTURE

Respondent.

Petition for Review of the Merit Systems Protection Board in DC0752060891-I-1.

ORDER

Note: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Petitioner, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judge who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc, and the same hereby is, DENIED.

The mandate of the court will issue on December 22, 2008.

Jan Horbaly
Jan Horbaly
Clerk

Dated: 12/15/2008

cc: Richard J. Link
Tara K. Hogan

BENJAMIN V AGRICULTURE, 2007-3330
(MSPB – DC075206089-1-I-1)